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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
SECRETARY

In the Matter of)
)
Implementation of Sections 3(n) and 332)
of the Communications Act)
)
Regulatory Treatment of Mobile Services)

GN Docket No. 93-252

To: The Commission

REPLY COMMENTS

Fresno Mobile Radio, Inc. (Fresno) by and through counsel hereby files Reply comments in the above captioned rule making and states its specific opposition to the proposal put forth by Nextel Communications, Inc. (Nextel) in its comments within this rule making.

Fresno Has Already Accommodated Nextel

Fresno is an operator of SMR facilities in Central California and has provided service to the public from its facilities for many years. Due to its proximity to one of Nextel's earliest designed ESMR systems, Fresno has already been forced to accommodate Nextel's plans for future growth. That is, Fresno has been forced to sit and watch while Nextel was granted license after license for dozens of frequencies for which no facilities have been constructed and which may not be constructed for years.

This result of Nextel's earlier granted waiver of the Commission's Rules has forestalled much of Fresno's growth in the SMR field. The number of available channels

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to serve Fresno's existing and growing subscriber base is no longer present due to Nextel's inventory of frequencies, which it possesses due to the Commission's largesse.

Fresno does not herein seek reconsideration of the Commission's earlier grant of Nextel's waiver. Fresno is fully willing to accept the consequences arising out of the changed circumstances wrought upon its business and the marketplace which have been the natural result of providing special consideration to this well-financed, voracious competitor, formerly known as Fleet Call, Inc.

However, Fresno vehemently opposes any further advantage for Nextel and other ESMR operators beyond what is presently available in accord with the Commission's Rules and policies. It is beyond comprehension that Nextel would have the temerity to seek additional considerations, given the extreme advantages that it now enjoys. Nextel's bald justifications contained within its comments belie the credibility of its proposal.

For example, Nextel's earlier efforts before the Commission have been attempts to free Nextel from the competitive pressures suffered by other SMR operators. For reasons still unclear to Fresno, the Commission was moved to sympathize with a company which stated in one breath that it was blessed with such resources as to have the capacity to devote hundreds of millions of dollars to its facilities, but could not spare the resources to construct the system within less than five years. These statements were,

of course, inconsistent, but history has shown that the Commission found reason within the contradiction.

With the Commission's grant of Nextel's request for waiver came the opening of Pandora's Box. Nextel immediately sought every channel, frequency and kilohertz of spectrum within its claimed market areas. Each was licensed and Nextel's flag was planted every mile within the terrain. Existing operators who were relegated to this new, unequal playing field were left with little or no spectrum upon which expand their existing systems. Fresno's market position was exacerbated by Nextel's freedom from loading standards, Nextel's freedom from equal construction deadlines and Nextel's claims in the market that all existing SMR operations were obsolete and useless.

All of these unfair competitive advantages have been enjoyed by Nextel. Each has provided this well-financed giant with every benefit which might reasonably be expected and much more. That Nextel would now seek even more is incredible. That Fresno and other similarly situated operators would be placed in the position of providing additional unwanted accommodation for Nextel's self-serving business plans is ridiculous.

Nextel Feigns Surprise

It appears by Nextel's comments that the Commission is being asked to believe that Nextel's difficulties are a surprise to Nextel. For the Commission to believe Nextel,

the Commission would have to accept the premise that the same Company which engages in self adulation for inventing, developing and engineering the service now known as ESMR, is so short sighted or foolish as to have not taken into consideration the environment of the marketplace. Given this explanation of events proffered by Nextel, the Commission has but two alternatives: (1) the Commission can accept Nextel's explanations on their face and recognize that this "innovative" giant is and was incapable of recognizing many factors which smaller, traditional SMR operators knew from the outset of Nextel's waiver request; or (2) the Commission may determine that Nextel knew and appreciated the dynamics of the SMR market and the technological hurdles of bringing its services to market; and that its most recent request was a planned strategy from the beginning.

No matter which conclusion is chosen by the Commission to explain Nextel's comments, either cuts against any favorable action on Nextel's proposal. For if the Commission accepts (1) above, it is apparent that Nextel or its equipment supplier lacks the necessary competence or foresight to be entrusted with a block of spectrum 10 MHz wide. If the Commission accepts the second proposition, it is apparent that Nextel is playing the Commission for a fool, having stuck the nose of the camel into the tent in 1991 and now demanding that the entire beast be invited to dine.

Nor should the Commission be lured into believing that Nextel's comments are a direct result of any Act of Congress. To believe that would require the Commission

to accept that but for the recent amendments to the Communications Act, Nextel would never have filed its proposal. Fresno respectfully states that Nextel's machinations are too clear for it to accept this "coincidence." It is apparent that Nextel always intended to request the relief it now seeks and simply awaited the opportunity to tie it to a convenient bit of legislation.¹

Fresno Questions Nextel's Eligibility

Underlying all of Nextel's comments is its demand for parity among CMRS operators. Yet, Nextel has not demonstrated its eligibility for CMRS status, much less its standing to demand equal treatment with CMRS operators. Fresno is aware that there is a challenge to Nextel's eligibility to be a Commission licensee, arising out of its request for waiver of foreign ownership requirements.

This challenge to Nextel's eligibility has been placed before the Commission by Mr. Kevin Lausman. If Lausman's objections are found by the Commission to have merit, Nextel would be unable to obtain the status of CMRS. Nextel's request appears wholly bizarre if one considers the possibility that Nextel, in fact, might be ineligible to

¹ Nextel has, however, chosen the wrong legislation for its plan. Were the Commission to grant Nextel's proposal, it would be circumventing Section 309(j) of the Communications Act of 1934, as amended by the Budget Act. Reallocation of spectrum would require the acceptance of applications which might be mutually exclusive, thereby requiring the holding of auctions.

continue operating as an ESMR.² It, therefore, is incumbent on the Commission to defer action on Nextel's proposal until such time as Nextel's status can be fully investigated, considered, and determined with finality.

There also exist antitrust questions arising out of Nextel's proposal. Nextel's proposal is obviously detrimental to competition in the marketplace. SMR operators who might be subjected to retuning of equipment will be discouraged from making greater investments in their systems. End users will be made known to Nextel to enable it to perform frequency changes, thereby revealing proprietary information to a huge competitor which might easily employ the opportunity to raid customers. And the trading and consolidation of markets and territories to accommodate Nextel's proposal, to create exclusive territories within MTAs, certainly demands scrutiny to determine the anti-competitive effects of such actions.³

As shown above, the issues that must be carefully considered prior to any action being taken to progress the latest element of Nextel's master plan are quite daunting. Nextel has conveniently failed to address these legal hurdles in its comments, but the Commission is not so lucky as to be able to ignore the effects of law on its decisions.

² Fresno is aware that the issue of Nextel's standing as an ESMR has little, if any, relevance within a rule making proceeding. Anyone, alien or citizen, may make comment in an unfettered fashion.

³ Nextel referred to companies which are under scrutiny by the Federal Trade Commission. It failed to mention the United States Justice Department's scrutiny of Nextel's own actions to determine whether Nextel is in violation of antitrust statutes.

The Commission must ponder these issues now to avoid reversal on appeal and the waste of the Commission's resources which would be attendant to such circumstances.

Perhaps if Nextel had chosen a more conventional route for its proposal, requesting its own separate rule making proceeding and subjecting the matter to full comment and public scrutiny so that the Commission would have the benefit of a full record, then these issues might be dealt with in a fair and open manner. However, Nextel did not choose this more logical method. Nextel has forced the issues through the back door into the open in this proceeding. Fortunately, the Commission has the authority to shut that back door on Nextel's proposal and invite Nextel, if it desires, to try again, with more direction from the agency.

Nextel Should Be Held To Its Promises

When Nextel received grant of its rule waiver request which created the possibility of ESMR operation, Nextel promised the Commission that it would not upset the Commission's spectrum allocation scheme in bringing forth the new service. Now, Nextel requests to be released from its promise, yet can provide no equitable basis for its request.

The Commission has stated its encouragement of emerging technologies and Nextel has benefitted by the Commission's support thus far. But in exchange for its support, the Commission demands a compact with those seeking such preferential

treatment. In effect, the Commission has demanded that the service be in the public interest, evidence progress in technology, and be built. By its actions in Nextel's favor, the Commission has met its part of the bargain. It has provided Nextel with a bounty of advantages over traditional SMR operators.

Nextel now comes before the Commission and states, in effect, that it cannot or will not fulfill its end of the deal which created the authority for Nextel to become the financial giant it is today. Nextel's advantages have thus far netted service to only 5,000 subscribers and there are serious questions about the quality of service that Nextel is able to provide these 5,000. This pittance of service pales in comparison to traditional SMR services provided in the Los Angeles area by non-ESMR operators.

Nextel's efforts in technology are also a bust. By its own, well-disguised admissions, its service is inundated with design problems such that it cannot be accommodated in the very environment where it claimed its service would thrive. And Nextel has failed to demonstrate real progress in building its vaunted systems. The Commission should carefully note that Nextel's comments speak to the vast number of channels which it has secured in some markets, but fails to state how many, or how few, of these channels are being used to provide ESMR service. A more thorough review of this facet of Nextel's operation would fully demonstrate that Nextel has utterly failed to live up to its end of the bargain with the Commission.

Fresno admits that Nextel has spent millions of dollars in promoting its service. It has filed a mound of applications, purchased thousands of channels from SMR operators, and has managed to capture the interest of one huge, multi-billion dollar corporation after another for distribution of another piece of its dwindling equity. But even after securing the combined assistance and assumed expertise of Matsushita, Comcast, Nippon Telephone and Telegraph, Motorola, American Mobile Systems, and now MCI, thus, British Telecom; Nextel stands before the Commission to say, "Sorry, it just don't work too good."

Perhaps it is time for the Commission to state emphatically that no more special consideration should be given to Nextel's cartel. Certainly the Commission can reasonably require Nextel to straighten its own technological house without further government assistance. And, if it turns out that Nextel has launched a lemon service, then, as with all businesses, this one might fail. The Commission can hardly, however, set a precedent to bail out sophisticated, multi-billion dollar corporations which individually and collectively should have known better. It is not the place of the Federal Communications Commission of the United States of America to squeeze the lemons for Nextel's lemonade.

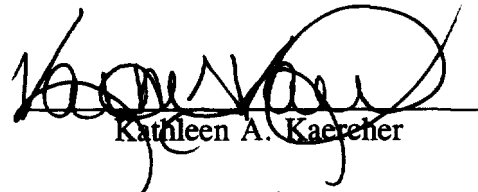
Conclusion

Nothing complained of by Nextel in its comments creates a basis for Commission approval of its scheme. The Commission should allow Nextel to be left to its own

devices, including the purchasing at full market value any systems in its claimed market areas which Nextel believes are necessary to the provision of a viable service to the public. In sum, the Commission has already done much for Nextel and no more is justified or needed.

Respectfully submitted,
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By



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Dated: July 11, 1994

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